UNITED STATES DISTRICT COURT
IN THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LYNN LUMBARD, ANITA YU, JOHN BOYER and MARY RAAB, individually and on behalf of all others similarly situated,

Plaintiffs,

vs.

Case No. 2:17-cv-13428-SJM-MKM
Hon. Stephen J. Murphy III
Magistrate Judge Mona K. Majzoub

CITY OF ANN ARBOR,

Defendant.
_____/

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DEFENDANT CITY OF ANN ARBOR'S
MOTION TO DISMISS FOR FAILURE TO STATE CLAIMS
UPON WHICH RELIEF MAY BE GRANTED

Defendant City of Ann Arbor ("City"), by its attorneys, moves the Court to dismiss Plaintiffs' Complaint pursuant to Fed. R. Civ. P. 12(b)(6) because Plaintiffs' Complaint fails to state any claim on which relief can be granted.

1. Plaintiffs' claims are time barred by the applicable statutes of limitations and/or laches.

2. Plaintiffs' claims are barred by issue preclusion (collateral estoppel) and/or claim preclusion (*res judicata*) and the requirements of full faith and credit.

3. Plaintiffs fail to state any claims upon which relief can be granted.

4. Plaintiffs' requests for declaratory and injunctive relief are moot and not based on any active case or controversy.

5. The City disputes the merits of Plaintiffs' claims, but arguments on the merits are not necessary for this motion under Fed. R. Civ. P. 12(b)(6).

6. In accordance with Local Rule 7.1(a), counsel for the City sought a telephone conference with counsel for Plaintiffs to seek concurrence with this motion. After leaving a voice mail, counsel for the City sent an email request for concurrence to counsel for Plaintiffs, which explained the nature of the motion, relief sought, and legal bases. Counsel for Plaintiffs did not call, but sent an email with responses to the City's explanation of the nature and grounds of the motion, and stated that the Plaintiffs did not concur.

7. The City relies upon the accompanying brief and exhibits thereto for support of this motion.

Wherefore, the City asks the Court to dismiss Plaintiffs' Complaint in its entirety with prejudice, and grant such other relief as is appropriate in the interests of justice, including an award of costs and attorney fees to the City for having to defend against Plaintiffs' Complaint.

Dated: December 15, 2017

Respectfully submitted,

By: /s/ Abigail Elias_____
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DEFENDANT CITY OF ANN ARBOR'S BRIEF IN SUPPORT OF MOTION TO DISMISS FOR FAILURE TO STATE CLAIMS UPON WHICH RELIEF MAY BE GRANTED

STATEMENT OF ISSUES PRESENTED

Should Plaintiffs' takings claims under the Fifth and Fourteenth Amendments to the U.S. Constitution, and 42 U.S.C. § 1983 be dismissed because the claims are barred by collateral estoppel and full faith and credit requirements?

The City Answers: Yes

This Court Should Answer: Yes

If Plaintiffs assert any other claims, should those claims be dismissed because they accrued in 2003, at the latest, and are barred by applicable statutes of limitations?

The City Answers: Yes

This Court Should Answer: Yes

If Plaintiffs assert any other claims, should those claims be dismissed because they fail to state any plausible claim upon which relief can be granted?

The City Answers: Yes

This Court Should Answer: Yes

Should Plaintiffs' "forced labor" claim be dismissed because Plaintiffs allege neither labor by Plaintiffs nor abuse or threatened abuse of any law or legal process by the City?

The City Answers: Yes

This Court Should Answer: Yes

Should any non-takings claims asserted by Plaintiffs be dismissed as precluded because Plaintiffs failed to join them in their unsuccessful state court cases?

The City Answers: Yes

This Court Should Answer: Yes

Should Plaintiffs' requests for declaratory and injunctive relief be dismissed both because Plaintiffs' substantive claims fails and because they are moot?

The City Answers: Yes

This Court Should Answer: Yes

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INTRODUCTION

This is the third lawsuit Plaintiffs and their counsel have filed against the City of Ann Arbor (the "City"), all asserting virtually identical claims arising from a footing drain disconnection ("FDD") program initiated by the City more than 16 years ago. Like the two prior lawsuits, this case should be summarily dismissed.

The City initiated the FDD program in 2001 to address repeat overflows from the City's sanitary sewer system and sanitary sewer backups into basements that occurred during heavy rainfalls. The FDD program required certain property owners to disconnect their footing drain discharge pipes from the City's sanitary sewer system, which was not proper, and connect them instead to a storm sewer system, which was proper. Plaintiffs disconnected in 2002 (Boyer/Raab and Lumbard) and 2003 (Yu). More than 11 years later, Plaintiffs filed two lawsuits in state court, alleging—as they allege in this case—that the sump pits, sump pumps and related equipment necessary to redirect water from their footing drains to a storm sewer system are a permanent physical invasion of their properties by the City, and therefore an unconstitutional taking without just compensation.

The state court dismissed both lawsuits on the merits, holding that Plaintiffs' takings claims failed because Plaintiffs—not the City—own the equipment and installations alleged to constitute a "taking." The Michigan Court of Appeals

affirmed. [1]

Having lost in state court, Plaintiffs now try to take yet another bite at the apple in federal court. Because the state court decided issues that are dispositive of Plaintiffs' federal takings claim, that claim is barred by the doctrines of issue preclusion and full faith and credit. Plaintiffs' remaining claims—if they even state any—are barred by the applicable statutes of limitation, by issue and/or claim preclusion, and because they otherwise fail to state valid claims. Plaintiffs' complaint should be dismissed in its entirety.

STATEMENT OF FACTS

Footing drains collect groundwater from under and around a building. See Exh. 1, COA Opinion at 2, fn. 1, and Exhibit 2 to Plaintiffs' Complaint (ECF 1-3, PgID 75). Properties constructed after the mid-1940s and before the mid-1970s often were built with footing drains that discharged into the City's sanitary sewer system.[2] However, the City's sanitary sewer system is designed to carry only sanitary sewage; not groundwater or stormwater. During heavy rains, stormwater

[1] The Court of Appeals' May 9. 2017, decision ("COA Opinion") is attached as Exhibit 1.

[2] Ordinance No. 8-73, enacted October 29, 1973, made explicit in City Code Sec. 2:43 the prohibition of groundwater discharge into the City's sanitary sewer system. (Exhibit 3 to Plaintiffs' Complaint; ECF 1-4). Plaintiffs misrepresent that the "grandfathering" provisions of Sec. 2:43 were in effect when the FDD ordinance was enacted in 2001. The "grandfathering" provision was repealed October 3, 1994, by Ordinance No. 53-94, which deleted existing Sec. 2:43 and moved the discharge prohibitions to Sections 2:42.3(8) (where it still is today) and 2:43.1(1)(m). Relevant pages of Ordinance No. 53-94 are attached as Exhibit 2.

percolates through the ground and seeps into footing drains. For properties still connected to the City's sanitary sewer system, the water then flows from those footing drains into the City's sanitary sewer system. During heavy rains, those flows caused significant public health concerns because they resulted in prohibited sanitary sewer overflows (sewage flow in streets, on land and into the Huron River), and backups of sewage into basements.

From 1997 into 2000, the City experienced sanitary sewer overflow events that triggered a regulatory complaint from the Michigan Department of Environmental Quality "MDEQ"). ECF 1, PgID 4 ¶11.[3] During heavy rain events in August of 1998 and June of 2000, a large number of residents experienced sanitary sewer backups into their basements.[4] Many of those backups occurred in the Morehead area where Plaintiffs Boyer and Raab live, in the Glen Leven area where Plaintiff Lumbard lives, and in the Orchard Hills area where Plaintiff Yu lives. (ECF 1, PgID 8 ¶29-31, pp. 13-14 ¶56, and p. 16 ¶71)

The City retained Camp Dresser & McKee ("CDM") as engineering consultants to study the problem and make recommendations. (ECF 1, PgID 16

[3] Plaintiffs misrepresent that the MDEQ's action was for "combined sewer overflows" or CSOs, and misrepresents throughout their complaint that the City has a combined storm and sanitary sewer. Plaintiffs attach the ACO as Exhibit 1 to their Complaint (ECF 1-2). The ACO, in ¶2.3 (ECF 1-2, PgID 56) states it pertains to sanitary sewer overflows (SSOs) and lists the SSOs. However, this Court need not address Plaintiffs' misrepresentations to decide the instant motion.

[4] Sanitary sewer overflow events continued to June 2002 before the City entered into the ACO. (ECF 1, PgID 5 ¶16; ECF 1-2, PgID 56, ¶2.3).

¶66) The June 2001 Sanitary Sewer Overflow Prevention Report of CDM and a Citizen Advisory Task Force documented that overflows and backups were from heavy rainwater flow into a system designed to carry only sanitary sewage. CDM and the Task Force focused on five problem areas, including the Orchard Hills, Morehead, and Glen Leven areas (ECF 1, PgID 17 ¶71 and p. 20 ¶84), and ultimately recommended the City remove wet weather flow into the sanitary sewer system through a comprehensive FDD program. (ECF 1, PgID 19 ¶80)

The City implemented the FDD program by enacting City Code Sec. 2:51.1 (the "FDD ordinance").[5] To reduce the amount of storm water flow into the City's sanitary sewer system from footing drains during heavy rainfall events, the FDD program required property owners in five highly impacted areas to disconnect their footing drains from the City's sanitary sewer system, and to discharge the flow to the City's storm sewer system or other approved point. Following routine plumbing requirements, sump pits, sump pumps and related equipment and piping were required to lift water from the footing drains and discharge it to the storm water system or a different location. The City chose to pay for the equipment and work necessary to disconnect the footing drains, with some limitations, and as part of the FDD ordinance, the City included a program to reimburse property owners for costs related to FDDs. Under the reimbursement program, property owners

[5] The FDD ordinance, as it was in effect in 2002 and 2003, is attached as Exhibit 3; it also is attached as Exhibit 5 to the Plaintiffs' complaint (ECF 1-6).

could select either a contractor pre-qualified by the City, or a contractor of their choice who could be approved by the City. (Sec. 2:51.1(8) and (9)) Participating property owners were then eligible to receive reimbursement for the cost of the materials and labor for the corrective work required by the FDD program. Although the FDD ordinance established a cap, necessary additional costs would be covered. (Sec. 2:51.1(3) and (12))

The Plaintiffs chose to participate in the reimbursement program, [6] and were reimbursed for the full cost of the work and installations required for the FDDs that they had done on their properties. They did not challenge the ordinance. The City has not had and Plaintiffs do not allege any contact by the City for enforcement or other purposes related to the FDD ordinance since 2003, at the latest.

PLAINTIFFS' PRIOR AND CURRENT LAWSUITS

Plaintiffs Yu, Boyer and Raab filed a complaint on February 27, 2014, in Washtenaw County Circuit Court. The original complaint had seven causes of action, including one based on Art. 10, § 2 of the Michigan Constitution (taking without just compensation, also known as inverse condemnation). The Circuit Court dismissed Plaintiffs' statutory claim for alleged violation of the Michigan Uniform Condemnation Act, and Plaintiffs later stipulated to voluntary dismissal

[6] The reimbursements were paid directly to the Plaintiffs' contractors, so Plaintiffs did not have to incur front end costs and then wait for reimbursement. Sec. 2:51.1(3) of the FDD ordinance. (Exh. 3.)

of their alleged federal claims under the Fifth Amendment to the U.S. Constitution and 42 U.S.C. § 1983. On December 26, 2014, these Plaintiffs filed their First Amended Complaint, which included only the takings claim.

After discovery, the City filed a motion for partial summary disposition, arguing that because it was undisputed Plaintiffs, not the City, own the equipment and facilities at issue, those installations cannot be the basis for a takings claim premised on a theory of physical occupation or invasion of their properties by the City. The trial court granted the City's motion for partial summary disposition, and because the Plaintiffs did not assert any other theory for their takings claim, dismissed the *Yu/Boyer/Raab* case in its entirety.[7]

Plaintiff Lumbard, represented by the same counsel as Plaintiffs Yu, Boyer and Raab—the same counsel representing the Plaintiffs in this case—filed a complaint on October 30, 2015, in Washtenaw County Circuit Court, and filed an amended complaint on January 21, 2016. Like the *Yu*/*Boyer*/*Raab* Complaint, the *Lumbard* Complaint alleged inverse condemnation based on physical occupation of her property by the equipment and facilities installed through the FDD program.[8] The City filed a motion for summary disposition, raising the same arguments as in the *Yu/Boyer/Raab* case. At the hearing, counsel for the parties agreed the issue of

[7] The Circuit Court's January 15, 2016, Order in *Yu*/*Boyer*/*Raab* is attached as Exhibit 4.

[8] Although Plaintiff Lumbard captioned her complaint as a class action, she never moved for certification of a class.

ownership in *Lumbard* was the same as the issue of ownership in *Yu*/*Boyer*/*Raab*, and counsel for Lumbard agreed that she, like Yu, Boyer and Raab, did not have any other theory for her takings claim. The trial court granted the City's motion for summary disposition and dismissed the case.[9]

Plaintiffs appealed both dismissals to the Michigan Court of Appeals, and the two cases were consolidated on appeal. On May 9, 2017, the Court of Appeals affirmed the trial court's rulings in both cases. (ECF 1 PgID 44 ¶161 and Exh. 1) In its decision, the Court of Appeals noted that the only type of takings claim pursued by Plaintiffs was a so-called "categorical taking" that arises when property owners suffer a permanent physical occupation of their property. (Exh. 1, COA Opinion at 5.) The Court of Appeals also noted that the only issue on appeal was whether the trial court had erred by concluding that "a taking by permanent physical occupation cannot occur if a plaintiff owns the installation." *Id*.

The Court of Appeals looked to the United States Supreme Court's opinion in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), stating: "Although the *Loretto* Court was interpreting the federal Takings Clause, we find *Loretto* persuasive because our state Takings Clause is 'substantially similar' to its federal counterpart." (Exh. 1, COA Opinion at 6.) Relying on the record and not just the Plaintiffs' concession that they own the installations (Exh. 1, COA Opinion

[9] The Circuit Court's March 31, 2016, Order in *Lumbard* is attached as Exhibit 5.

at 7), the Court of Appeals concluded that the Circuit Court properly held "there was no taking by permanent physical occupation in this case because plaintiffs owned the installations on their properties," and affirmed the dismissals of both cases. Plaintiffs did not seek further appellate review.

Plaintiffs, now together, filed this lawsuit on October 20, 2017, asserting five "causes of action." As stated in the Complaint's "Preliminary Statement" (ECF 1, PgID 1, ¶1), the lawsuit is against the City for "takings of private residential property by means of physical invasions and permanent physical occupations" as a result of the FDD program. The first cause of action (their "takings" claim) is based on the Fifth Amendment to the U. S. Constitution, but is the same as their state law takings claims in state court. The second cause of action is brought under 42 U.S.C. § 1983. Although it does not articulate with clarity any actual cause of action, Plaintiffs apparently try to assert a claim of "forced labor." The third, fourth and fifth "causes of action" are simply claims for relief; not causes of action.

ARGUMENT

I. STANDARD OF REVIEW

For a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a court accepts as true all well-pleaded allegations in a complaint and construes them in the light most favorable to the plaintiff, *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), and

determines whether, as a matter of law, the plaintiff is entitled to legal relief if all the facts and allegations in the complaint are taken as true. *See Mayer v. Mylod*, 988 F.2d 635, 638 (6th Cir. 1993). A complaint without allegations sufficient to support a claim under any legal theory must be dismissed. *Columbia Natural Resources, Inc. v. Tatum*, 58 F.3d 1101, 1109 (6th Cir. 1995). To survive dismissal, a complaint must allege sufficient facts "to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A court is "not bound to accept as true a legal conclusion couched as a factual allegation," and "only a complaint that states a plausible claim for relief survives a motion to dismiss." *Ashcroft v. Iqbal*, 556 U.S. 662, 678-679 (2009) (citations omitted).

The Court may also find under Rule 12(b)(6) that Plaintiff's claims that are time barred, even though that is normally asserted as an affirmative defense. The Court may consider materials that are public records or otherwise appropriate for judicial notice in addition to the complaint. *New England Health Care Employees Pension Fund v. Ernst & Young, LLP*, 336 F.3d 495, 501 (6th Cir. 2003) (reliance on a complaint in another case previously filed by the plaintiff was proper), modified on other grounds by *Merck & Co. v. Reynolds*, 559 U.S. 633 (2010). Consideration of such material does not convert a Rule 12(b)(6) motion to a Rule 56 motion. *Id.*; *Whittiker v. Deutsche Bank Nat'l Trust Co.*, 605 F. Supp. 2d 914,

925 (N.D. Ohio 2009).

II. PLAINTIFFS' CLAIMS UNDER THE JUST COMPENSATION CLAUSE OF THE FIFTH AMENDMENT FAIL BECAUSE THEY ARE BARRED BY ISSUE PRECLUSION (COLLATERAL ESTOPPEL) AND FULL FAITH AND CREDIT REQUIREMENTS.

Plaintiffs' federal takings claims are barred by the doctrines of full faith and credit and issue preclusion. Under 28 U.S.C. § 1738, "a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984). Under Michigan law, issue preclusion (also known as collateral estoppel) "precludes relitigation of an issue in a subsequent, different cause of action between the same parties where the prior proceeding culminated in a valid, final judgment and the issue was . . . actually litigated, and . . . necessarily determined." *Southfield Educ. Ass'n v. Southfield Bd. Of Educ.*, 570 F. App'x 485, 488 (6th Cir. 2014) (quoting *People v. Gates*, 434 Mich. 146, 154, 452 N.W.2d 627, 630 (1990)).

In *San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323 (2005), the Supreme Court addressed essentially the same scenario as is now before this Court. The *San Remo Hotel* plaintiffs, like the Plaintiffs here, first litigated their takings claims in state court, following the requirements of *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 US 172 (1985), and reserved their federal takings claims under *England v.*

Louisiana Bd. of Medical Examiners, 375 U.S. 411 (1964). After losing in the state courts, they brought their federal takings claim in federal court, and asked the court to exempt their claims from the full faith and credit requirements of 28 U.S.C. § 1738. *San Remo Hotel,* 545 U.S. at 327.

The district court held that *Williamson County* did not require general preclusion principles to be set aside and, finding California and federal takings law to be coextensive, held that issue preclusion barred the plaintiffs' federal takings claim. The Court of Appeals and then the United States Supreme Court affirmed. *San Remo Hotel,* 545 U.S. at 335. The Supreme Court observed,

> *England* does not support [the plaintiffs'] erroneous expectation that their reservation would fully negate the preclusive effect of the state-court judgment with respect to any and all federal issues that might arise in the future federal litigation. Federal courts, moreover, are not free to disregard 28 U.S.C. § 1738 simply to guarantee that all takings plaintiffs can have their day in federal court.

545 U.S. at 338.

Similarly, Plaintiffs in this case are precluded from pursuing their takings claim in this Court because issues actually litigated and decided in the state court proceedings are dispositive of their federal claims. Specifically, the state courts decided conclusively that Plaintiffs cannot state a takings claim based on equipment and installations the Plaintiffs own. Because "[t]he substantive requirements of the Michigan Takings Clause [of Article 10, § 2] are indistinguishable from those . . . required by the Fifth Amendment," the claim

cannot be relitigated in this Court. *Anderson v. Charter Twp. of Ypsilanti*, 266 F.3d 487, 493-494 (6th Cir. 2001), relying on *Adams Outdoor Adver. v. City of East Lansing*, 463 Mich. 17, 23, 614 N.W.2d 634, 638 (2000).

That Michigan and federal takings law are coextensive is underscored by the Michigan Court of Appeals' reliance on state takings cases as well as on the seminal federal takings case, *Loretto v. Teleprompter Manhattan CATV Corp.*, *supra*, for its analysis and decision holding that the Plaintiffs' takings claims failed because they own the facilities and equipment at issue:

> In [*Loretto*] the United States Supreme Court recognized the first type of categorical taking by stating that 'permanent physical occupation authorized by government is a taking . . . .' But the *Loretto* Court added that '[s]o long as the[] regulations do not require the landlord to suffer the physical occupation of a portion of his building by a third party, they will be analyzed under the multifactor inquiry generally applicable to nonpossessory governmental activity.' *Id*. at 440, citing *Penn Central Transp Co*, 438 US 104 (emphasis added). The *Loretto* Court went on to explain that the 'permanent physical occupation' analysis is dependent on whether the landowner owns the installation.

COA Opinion at 6 (Exh. 1).

Under *San Remo Hotel* and *Southfield Educ. Ass'n*, the full faith and credit requirements of 28 U.S.C. § 1738, and the doctrine of issue preclusion/collateral estoppel, Plaintiffs do not get a "second bite at the apple" to litigate their takings claim in federal court. *San Remo Hotel*, 545 U.S. at 346. The Michigan state courts conclusively decided that Plaintiffs owned the facilities and equipment at issue, and therefore could not pursue a claim for takings by physical invasion or

occupation. Those rulings are dispositive of Plaintiffs' federal takings claims, which should be dismissed.

III. PLAINTIFFS' CLAIMS UNDER 42 U.S.C. § 1983 ARE TIME BARRED.

A. This Court Can Dismiss on Statute of Limitations Grounds Even Though Plaintiffs Omitted Relevant Dates from the Complaint.

A statute of limitations defense is properly raised on a motion to dismiss under Rule 12(b)(6) and the claims are properly dismissed when the allegations in the complaint affirmatively establish that the time limit for bringing the claims has passed. *Jones v. Bock*, 549 U.S. 199, 215 (2007); *Cataldo v. U.S. Steel Corp*., 676 F3d 542 (6th Cir. 2012), cert denied 133 S.Ct. 1239 (2013). Even though Plaintiffs chose not to plead the relevant dates in their federal Complaint, this Court can dismiss Plaintiffs' claims on statute of limitations grounds by relying on their state court complaints or other records that are appropriate for judicial notice. *New England Health Care Employees Pension Fund*, 336 F.3d at 501.

Per Plaintiffs Yu, Boyer and Raab's state court complaint, Plaintiffs Boyer and Raab's FDD was completed in 2002 (*Yu/Boyer/Raab* state court First Amended Complaint, p 18 ¶37; attached as Exhibit 6), and Plaintiff Yu's FDD was completed on September 4, 2003 (*Id.*, p 17 ¶31).

Although Plaintiff Lumbard did not state the date of her FDD in her state court complaint, the records of her contract for the FDD work were submitted

without dispute to the trial court and Michigan Court of Appeals and established that Plaintiff Lumbard contracted with Hutzel Plumbing & Heating to have her FDD done in 2003. *See* attached Exhibit 7.[10]

B. Plaintiffs' Section 1983 Claims Are Subject to the State Three-Year Statute of Limitations and Federal Law Regarding Accrual.

Michigan law dictates the limitation period for claims asserted under 42 U.S.C. § 1983. *Wallace v. Kato*, 549 U.S. 384, 387 (2007); *Searcy v. Oakland Cnty.*, 735 F. Supp. 2d 759, 765 (E.D. Mich. 2010). Such claims are subject to the state statute of limitations for injury to person or property, *Wilson v. Garcia,* 471 U.S. 261 (1985), which in Michigan is three years. M.C.L. § 600.5805(10). *See Searcy*, 735 F. Supp. 2d at 765 (the three-year statute of limitations applicable to § 1983 claims in Michigan is "well settled").

Although the three year limitation period is determined under Michigan state law, the date a claim accrues for purposes of 42 U.S.C. § 1983 is determined under federal law. *See Sevier v. Turner*, 742 F.2d 262, 272-273 (6th Cir. 1984). A Section 1983 claim accrues "[W]hen the plaintiff knows or has reason to know of the injury which is the basis of his action. A plaintiff has reason to know of his

[10] These records were received and maintained by the City as records necessary for and in the regular course of the FDD reimbursement program; they are appropriate for judicial notice under F.R.E. 201 and can be properly considered by the Court in resolving this motion. *New England Health Care Employees Pension Fund, supra.* The Court of Appeals Opinion includes these dates for Plaintiffs Boyer, Raab and Yu, and that Plaintiff Lumbard received the notice that started her FDD process in 2002. (Exh. 1, COA Opinion at 2-3.)

injury when he should have discovered it through the exercise of reasonable diligence." *Id*. at 273.

C. Plaintiffs' Due Process Claims under Section 1983 Are Time Barred.

The three-year limitations period applies to whatever alleged deprivation of rights is the basis of Plaintiffs' claims for under 42 U.S.C. § 1983. If their claims pertain to the FDD ordinance itself, those claims accrued when the FDD ordinance was enacted in August 2001. If their claims pertain to their obligation to comply with the FDD ordinance, those claims accrued when they were given notice to comply in 2002 or 2003. If their claims pertain to the FDD facilities they installed, those claims arose when they contracted for their FDDs and had the facilities installed in 2002 and 2003. Those are the dates by which Plaintiffs had reason to know of the alleged injuries that form the basis of their claims. Plaintiffs do not allege any actions against them by the City related to the FDD ordinance since October 20, 2014—or even since 2003. Because approximately fourteen years have passed since the accrual of the last possible claim Plaintiffs might assert, all their claims under 42 U.S.C. § 1983 are barred by the three-year limitation period and should be dismissed.

D. Plaintiffs' "Peonage, Slavery and Trafficking in Persons" Claims Are Time Barred.

Though lacking a dedicated count, Plaintiffs' complaint alleges in

conclusory fashion that the City's enforcement of its FDD ordinance violates 18 U.S.C. § 1589(a)(3) (Forced Labor; part of Chapter 77—Peonage, Slavery and Trafficking in Persons). *See* Complaint, ECF 1, PgID 26 ¶102 (allegation of "'corvée labor' for the City"), PgID 39 ¶147 (describing homeowner responsibilities), and PgID 47 ¶173 ("enforcement of the … Ordinance … constitutes … the imposition of … mandatory work and physical labor … obtained by threats of legal process … in violation of 18 U.S.C. § 1589(a)(3)").

As argued in Section IV.B, below, Plaintiffs' claim is absurd on its face. However, this Court need not reach the patent inadequacy and absurdity of this "forced labor" claim because the claim is time barred. The statute of limitations is ten years for a civil action under 18 U.S.C. § 1595 alleging a violation of 18 U.S.C. § 1589. 18 U.S.C. § 1595(c). Plaintiffs allege no acts whatsoever of force, deprivation, or similar coercive acts against them by the City, and the only action they allege that might be characterized as enforcement by the City is the notices to disconnect they got in 2002 and 2003. Because Plaintiffs' claims, if any, accrued in 2002 or 2003, their "forced labor" claims should be dismissed as time barred

IV. PLAINTIFFS' CLAIMS UNDER 42 U.S.C. § 1983 (SECOND CAUSE OF ACTION) FAIL TO STATE ANY CLAIM.

Even if Plaintiffs' Section 1983 claims were not time barred, they should be dismissed on the merits because Plaintiffs have not stated any plausible claim for relief upon which relief can be granted under the statute.

A. Any Section 1983 Claim Arising from an Alleged Taking Is Barred by Issue Preclusion.

To the extent Plaintiffs assert Section 1983 claims based on an alleged unconstitutional taking of property without just compensation, that claim, like Plaintiffs' "First Cause of Action," is barred by the doctrines of issue preclusion and full faith and credit for the reasons set forth in Section II, above. Section 1983 does not create an independent cause of action; it is merely a procedural mechanism for Plaintiffs to assert derivative claims that the City deprived them of rights based on violations of rights provided by or secured by the U.S. Constitution or Acts of Congress. *See, e.g.*, *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617–618 (1979); *Smoak v. Hall*, 460 F.3d 768, 777 (6th Cir. 2006). Because Plaintiffs' constitutional takings claim is barred by the doctrine of issue preclusion, their derivative Section 1983 claim fails as well.

B. Plaintiffs' "Forced Labor" Claim Is Not Plausible and Fails to State a Claim.

Even if it were not time barred, Plaintiffs' "forced labor" claim is absurd and should be dismissed for failure to state a claim. [11] It should be dismissed because it

[11] This claim also fails because 18 U.S.C. § 1595 cannot be applied retroactively to acts before December 19, 2003, the date the Trafficking Victims Protection Reauthorization Act ("TVPRA") was amended to allow civil actions. *Velez v. Sanchez*, 693 F.3d 308, 325 (2d Cir. 2012); *Ditullio v. Boehm*, 662 F.3d 1091, 1100–02 (9th Cir.2011). Because the Plaintiffs had their FDDs completed before December 19, 2003, they cannot bring a claim under 18 U.S.C. § 1595 related to their FDDs.

fails the basic requirements of *Ashcroft v. Iqbal*, *supra*, and *Bell Atlantic Corp. v. Twombly*, *supra,* for pleading a plausible claim. For its review of Plaintiffs' complaint to determine if it states a plausible claim for relief for alleged "forced labor," this Court should "draw on its judicial experience and common sense." *Ashcroft v. Iqbal*, 556 U.S. at 678-679.

Plaintiffs allege only in conclusory fashion that the City's enforcement of the FDD violated 18 U.S.C. § 1589(a)(3), which as part of the TVPRA criminalizes "obtain[ing] the labor or services of a person … by means of the abuse or threatened abuse of law or legal process."

The claim also fails because Plaintiffs identify no provision of the FDD ordinance that is "law" or "legal process" that has been used for a purpose for which it was not designed, or otherwise abused or threatened to be abused by the City. Plaintiffs claim only that the responsibility for "the observation, inspection, operation, repair and maintenance of the pumps and related equipment" they own constitutes "forced labor," (ECF 1, PgID 39 ¶147), but the FDD ordinance (Exh. 3; Exhibit 5 to Plaintiffs' Complaint, ECF 1-6) contains no provision that compels property owners, including these Plaintiffs, to perform any work.

Although the FDD Ordinance places on the property owners who installed and own them the responsibility to maintain the improvements installed as part of the FDD program (Sec. 2:51.1(13)), it neither requires property owners to perform

any labor personally, nor has any enforcement mechanism regarding the maintenance provision. The provision is simply a statement of responsibility. This fails as a forced labor claim. *See Robinson v. Oaks*, No. 15-12749, 2015 U.S. App. LEXIS 23231, at *6 (11th Cir. Aug. 8, 2015)[12] (rejecting as frivolous a forced labor claim based on a court order that required the property owner to maintain his property in accordance with deed restrictions, noting that the injunction "did not require Robinson or his family to personally perform the labor or provide services associated with home maintenance.") Plaintiffs' forced labor claims fail for similar reasons. The maintenance provision of the FDD ordinance also serves the purpose for which it was designed. Given that Plaintiffs own the facilities and equipment at issue, any maintenance work they may do or contract to have done from time to time is for their own benefit, and for the benefit of their property.. For this reason as well, it is not "forced labor."

Federal courts have resisted attempts to "transform a statute passed to implement the Thirteenth Amendment against slavery and involuntary servitude" into a broad federal criminalization of behavior. *United States v. Toviave*, 761 F.3d 623, 629 (6th Cir. 2014) (rejecting attempt to extend 18 U.S.C. § 1589 to apply to what amounted to child abuse). Because the "'core of criminality'" in Section 1589(a)(3) "is the abuse or threatened abuse of the law or legal process to

[12] Copy attached as Exhibit 8.

obtain the labor of an individual," a claim must "specify what acts Defendant committed that constitute" such abuse or threatened abuse "'against another primarily to accomplish a purpose for which it is not designed.'" *United States v. Peterson*, 544 F. Supp. 2d 1363, 1375 (M.D. Ga. 2008) (quoting the statute and The Restatement (Second) of Torts, ¶ 682). The statute explicitly defines "abuse or threatened abuse of law or legal process" to mean:

> [T]the use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action.

18 U.S.C § 1589(c)(1) (emphasis added). *See Alvarado v. Universidad Carlos Albizu,* 2010 WL 3385345, at *3 (No. 10-22072-CIV, S.D. Fla. Aug. 25, 2010) (§ 1589(a)(3) requires "that a defendant be accused of misusing or threatening to misuse legal process for a coercive purpose.")[13] (Emphasis in original.)

Plaintiffs have made no such allegations. They allege nothing close to the cases where "forced labor" based misuse or threatened misuse of legal process have been held to violate 18 U.S.C. § 1589(a)(3). *See, e.g., United States v. Calimlim*, 538 F.3d 706, 710 (7th Cir. 2008) (in addition to physical restraint and withholding of access to pay, threats of deportation proceedings used to force individual to perform labor for minimal pay).

[13] Copy attached as Exhibit 9.

C. Plaintiffs' Non-Takings Claims Are Barred by Claim Preclusion (*Res Judicata*)

Although any non-takings claims Plaintiffs may be alleging now were time-barred before they filed their state court complaints, those non-takings claims also are barred by claim preclusion (also known as *res judicata*). "28 U.S.C. § 1738 … requires the federal court to give [a] prior [state-court] adjudication the same preclusive effect it would have under the law of the state whose court issued the judgment." *Stemler v. Florence,* 350 F.3d 578, 586 (6th Cir. 2003). In Michigan, this effect is broad. *Gose v. Monroe Auto Equip. Co.,* 409 Mich. 147, 160, 294 N.W.2d 165, 167 (1980). Judgments bar a second action when (1) they arise from a decision on the merits, (2) the second action could have been adjudicated in the first, and (3) both actions involve the same parties. *Sewell v. Clean Cut Management, Inc.,* 463 Mich. 569, 575, 621 N.W.2d 222, 225 (2001).

In *Buck v. Thomas M. Cooley Law School*, 597 F.3d 812 (6th Cir. 2010), the Court of Appeals affirmed that claim preclusion barred federal litigation of claims that should have been, but were not, brought in prior state actions. More recently, this Court concluded that a plaintiff's arrest-related, Fourth Amendment, excessive force claim was precluded by a Michigan court's dismissal of other arrest-related claims, because the federal claims "were viable during" the state case and "based on the same facts." *Fizer v. City of Burton*, No. 15-cv-13311, 2016 WL 6821989,

at *6 (E.D. Mich. Nov. 18, 2016)[14] ("Plaintiff's failure to bring his present claims in" the state court case "bars the instant action pursuant to the doctrine of *res judicata*").

Plaintiffs' non-takings claims are barred under the doctrine of *res judicata*. First, their state court claims were dismissed with prejudice, which is "final adjudication[s] on the merits" with "res judicata effect." *Warfield v. AlliedSignal TBS Holdings, Inc.*, 267 F.3d 538, 542 (6th Cir. 2002) (quotations omitted). Second, Plaintiffs not only could have adjudicated their claims in the Michigan court,[15] they were obliged to do so. M.C.R. 2.203(A) (requiring a plaintiff to "join every claim" that "arises out of the transaction or occurrence that is the subject matter of the action"); *Hendrix v. Roscommon Township*, No. 03–CV–10047–BC, 2004 WL 1197359, at *4 (E.D. Mich. May 18, 2004)[16] (holding plaintiffs were obligated by M.C.R. 2.203(A) to bring all their claims in state court because they arose from the subject matter described in one of the claims). Plaintiffs' claims are all based on the same transactions, core facts and evidence: their participation in the City's FDD program. Finally, both the state cases and this case involve the same parties. The Plaintiffs should have joined any possible non-takings claims in

[14] Copy attached as Exhibit 10.
[15] Plaintiffs Yu, Boyer and Raab even included some of their federal claims in their state court lawsuit, but then voluntarily dismissed them.
[16] Copy attached as Exhibit 11.

state court but did not, so those claims are barred by claim preclusion and should be dismissed.

V. PLAINTIFFS' REQUESTS FOR DECLARATORY RELIEF AND INJUNCTIVE RELIEF ARE BOTH TIME-BARRED AND MOOT.

Requests for injunctive and declaratory relief are not causes of action; it is simply a request for a form of relief. *See Goryoka v. Quicken Loan, Inc.*, 519 F. App'x 926, 929 (6th Cir. 2013), and *Schilling v. Rogers*, 363 U.S. 666, 677 (1960). Because Plaintiffs' causes of action are all barred or otherwise fail, Plaintiffs' requests for injunctive and declaratory relief must be dismissed as well. *See Anderson v. Gates*, 20 F. Supp. 3d 114 (D.D.C. 2013), aff'd sub nom. *Anderson v. Carter*, 802 F.3d 4 (D.C. Cir. 2015), in which the court denied the plaintiff's request for injunctive and declaratory relief after concluding he had no viable constitutional claim or judicially remediable right for which declaratory judgment could be a remedy. 20 F. Supp. 2d at 128-129.

In addition, injunctive and declaratory relief are available only where there is an "actual" or "live" case or controversy. 28 U.S.C. § 2201(a); *Coleman v. Ann Arbor Transportation Authority*, 947 F. Supp. 2d 777, 784 (E.D. Mich 2013). Courts have noted that the underlying purpose of declaratory relief is to guide parties' conduct in the future so as to avoid litigation. *See The Hipage Co., Inc. v. Access2Go, Inc.*, 589 F. Supp. 2d 602, 615 (E.D. Va. 2008). Declaratory judgment is therefore inappropriate when the harm is alleged to be already done and the

declaration will serve no purpose. *Tapia v U.S. Bank, N.A.*, 718 F. Supp. 2d 689 (E.D. Va. 2010), aff'd, 441 F. App'x 166 (4th Cir. 2011) (declaratory judgment inappropriate because "any wrong Plaintiffs suffered as a result of the allegedly deficient foreclosure has already occurred").

In this case, a halt to enforcement of the ordinance as requested by Plaintiffs would not benefit or otherwise affect Plaintiffs; nor would a declaratory judgment as to the validity of Sec. 2:51.1 (the FDD ordinance). Because the Plaintiffs disconnected their footing drains more than a decade ago, compliance by Plaintiffs with the disconnect requirements and reimbursement program of Sec. 2:51.1—the sole subject of Sec. 2:51.1—is now moot; Plaintiffs cannot be required to disconnect what is already disconnected. Because there is, therefore, no live case or controversy, Plaintiffs' requests for injunctive and declaratory relief are moot and should be dismissed.

Plaintiffs also request declaratory relief to declare that the City should have used Michigan statutory condemnation procedures for the FDD program. Plaintiffs Yu, Boyer and Raab asserted that claim in state court and the court dismissed it on the merits on City's first motion for summary disposition.[17] This is purely a state law issue, and Plaintiffs did not appeal the state court's dismissal of that claim. It cannot be relitigated in this forum.

[17] The Circuit Court's December 3, 2014, Order is attached as Exhibit 12.

CONCLUSION

Plaintiffs' complaint should be dismissed in its entirety with prejudice pursuant to Fed. R. Civ. P. 12(b)(6) for the reasons argued above. Defendant City also should be awarded its costs, including attorney fees, for having to defend against this action.

Dated: December 15, 2017

Respectfully submitted,

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OFFICE OF THE CITY ATTORNEY

CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2017, I electronically filed the foregoing documents with the Clerk of the Court using the ECF System which will send notice of such filing to the following: Plaintiffs' Counsel, Donald W. O'Brien, Jr.

/s/ Stephanie Brink
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